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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

NANCY PEC et al.,

Plaintiffs and Respondents,

v.

SHERON BRACKENBURY,

Defendant and Appellant.

A142104

(Humboldt County  
Super. Ct. No. DR080769)

After a bench trial, the trial court found defendant Sheron Brackenburg liable in tort, but not contract, for defrauding Nancy Pec and Charles Crouse in a residential real estate transaction. In calculating damages, the trial court credited the opinion of the purchasers' valuation expert, who testified Pec and Crouse overpaid for the property by \$175,000. The trial court also awarded the purchasers attorney fees and costs, pursuant to a fee shifting clause in the real estate sales contract, and prejudgment interest.

On appeal, Brackenburg challenges the admissibility of the valuation testimony, claiming the expert was not a qualified appraiser. She also challenges the trial court's award of attorney fees, claiming her victory on the purchasers' contract claim made her the prevailing party under the sales contract, despite her loss on the tort claims. Finally, she challenges the award of prejudgment interest on procedural grounds. We conclude the expert was qualified, the fee award justified, and the prejudgment interest properly awarded. We therefore affirm.

## **BACKGROUND**

In May 2006, Brackenburg and Michael Pitek sold a parcel of residential real property in Eureka, California, to Pec and Crouse for \$375,000.

About two years later, when the property turned out to be in worse shape than promised, Pec and Crouse sued Brackenburg and Pitek. The purchasers' complaint alleged a variety of causes of action sounding in contract and tort.

At a bench trial, the trial court made findings about the sales transaction that, for the most part, are undisputed on appeal.

During negotiations over the property, Pitek told the purchasers he had renovated the property after a fire, had obtained all necessary permits, and had no trouble with the north and south neighbors.

After the sale, the purchasers discovered problems the sellers had not disclosed, either orally or in written disclosure statements. These included:

- (1) Pitek had promised the neighbor to the north to construct a retaining wall to protect against a dirt slide, but never constructed it;
- (2) the south neighbor told Pitek a retaining wall was encroaching on her property and looked to be failing, and in fact it was doing both—plaintiff's repair required CEQA review;
- (3) the second-story deck was not permitted and went over the property line;
- (4) a portion of sidewalk by the garage had moved, cracked, and dropped down;
- (5) the gas line was improperly installed and had to be relocated;
- (6) the laundry room was not permitted and not built on a proper foundation;
- (7) the furnace was not where it was shown on house plans and interfered with use of the laundry room;
- (8) a conversion of the second floor attic to a loft was done without a required permit;
- (9) stairs in the home were not constructed according to building code;

(10) there was mold in the master bedroom;

(11) there was inadequate plumbing and ventilation in the master bathroom.

The trial court heard from several witnesses about the property's true value at the time of sale, in light of these problems.

According to certified real estate appraiser Stuart Rosenberg, absent problems with the property, the \$375,000 sale price would have been fair.

An appraisal report by Charles Petty estimated the diminution in the property's value attributable to the inadequate retaining wall on the south side of the property and the risk of "slippage." He looked at other properties in the area with more severe slippage defects and determined that two properties with irreparable foundation problems had been devalued by 63 percent to 65 percent while another property with a reparable foundation problem was devalued by 43 percent. Petty estimated the purchasers' property should be devalued by 23 percent. So, based on a \$375,000 starting value, Petty offered the estimated valuation of \$290,000.

Elena Susmilch, Senior Real Estate Property Assessor for the Humboldt County Assessor's Office, had 16 years' residential and commercial appraisal experience with the county and has a real estate license. She is certified by the state to conduct appraisals, but is not licensed to do appraisals for private individuals or banks. Susmilch accepted Petty's conclusions regarding devaluation based on the slippage problem. She then considered the other undisclosed defects, including the encroachments, unpermitted construction, mold, and the need for CEQA remediation. She concluded the 2006 value of the property was \$200,000, not the \$375,000 the purchasers paid. She did not look at comparables to establish the \$375,000 starting price and ultimate 2006 value. Rather, she used the sale price as her starting point for her devaluation adjustments.

Brackenbury objected to Susmilch as a valuation expert, arguing she did not hold a license as a California registered appraiser. The trial court expressed uncertainty about Brackenbury's objection, and asked if she was simply "pointing out the limitation of the

testimony.” Brackenbury said yes, and the court said that was fine. After trial, the court asked for supplemental briefing on whether Susmilch was competent to testify about a reduced valuation.

Ultimately, the trial court found Pitek and Brackenbury’s partnership had defrauded the purchasers and accepted Susmilch’s valuation. It found the sellers liable under the causes of action for fraudulent misrepresentation, negligent misrepresentation, fraudulent concealment, and failure to disclose material facts. It awarded damages, pursuant to Civil Code 3343, for the difference between the purchase price and actual value at the time of purchase (\$175,000), plus amounts spent in reasonable reliance on the fraud (\$5,275).

The trial court, however, rejected the purchasers’ contract claim against Brackenbury. In its May 24, 2013 statement of decision, it concluded the false written disclosures were not themselves a contract and that Brackenbury herself did not have an obligation to disclose problems under the sales agreement because she only became aware of problems after the sale. It also rejected the Civil Code section 1102 claim and the negligent failure to supervise claim.

Citing a clause in the real estate sales agreement that provided costs and attorney fees to a prevailing party in an “action . . . arising out of” the agreement, the purchasers filed a motion seeking over \$371,000 in fees and costs. Brackenbury filed a cross-motion for her costs and fees, believing she was entitled because she had prevailed on the sole contract claim in the case.

The trial court granted the purchasers \$345,539.19 in costs and attorney fees. It denied Brackenbury’s motion for costs and fees. The final judgment also awarded the purchasers prejudgment and postjudgment interest.

Brackenbury, but not Pitek, appeals.

## DISCUSSION

### *Susmilch's Valuation Testimony Was Reasonably Considered*

Expert testimony is an acceptable way of establishing property value. (See Evid. Code, § 813.) The valuation expert need not be a licensed appraiser or hold a particular job, so long as the expert possesses relevant training. “A witness who through knowledge and experience is able to ‘form an intelligent judgment as to the value of land beyond that possessed by persons generally is competent to give an opinion on fair market value even though he is not a real estate appraiser or broker.’ ” (Simons, Cal. Evidence Manual, (2016) § 4:41, pp. 345–346, quoting *San Bernardino County Flood Control Dist. v. Sweet* (1967) 255 Cal.App.2d 889, 898; e.g., *Douglas v. Ostermeier* (1991) 1 Cal.App.4th 729, 738 [realtor with over 10 years’ experience could testify to the value of commercial property, even though he primarily sold residential property and had not conducted a comparative market analysis of the property at issue]; see also *In re Marriage of Hokanson* (1998) 68 Cal.App.4th 987, 995–996.)

“[W]hether a witness is qualified to testify as an expert on the value of real estate is within the sound discretion of the trial court.” (*In re Marriage of Hokanson, supra*, 68 Cal.App.4th at p. 995.) We review a trial court’s ruling on the admissibility of such an expert’s testimony under the same standard. (*In re Marriage of Winternitz* (2015) 235 Cal.App.4th 644, 653.)

The trial court here acted well within its discretion by allowing Susmilch, a seasoned Humboldt County appraiser with 16 years’ experience and a real estate license, to offer an opinion on the value of property within the county.

Brackenbury contends Evidence Code section 810 precluded Susmilch’s valuation testimony. Section 810 simply states that the general Evidence Code provisions governing property valuation do “not govern ad valorem property tax assessment or equalization proceedings.” (§ 810, subd. (b).) The provision has no application here. Nothing about the section suggests Susmilch or other county personnel with adequate

training would be unqualified to offer an opinion on value in ordinary private litigation. Further, the fact Susmilch briefly mentioned Revenue and Taxation Code section 110 during her trial testimony does not in any way establish Susmilch applied some materially different “tax” valuation rules to this dispute. Indeed, the portion of Revenue and Taxation Code section 110 Susmilch mentioned merely states the unremarkable principle that fair market value must account for the buyer and seller having all relevant information about a property sale they are negotiating. (Rev. & Tax. Code, § 110, subds. (a)–(b).)

In her reply brief, Brackenbury also asserts Evidence Code section 822 precluded Susmilch’s testimony. By not raising the argument sooner, Brackenbury has forfeited it. (*Nolte v. Cedars-Sinai Medical Center* (2015) 236 Cal.App.4th 1401, 1410.) In any case, that provision is also irrelevant, as it only limits the use of County property assessments in an “eminent domain or inverse condemnation proceeding,” which this case is not. (§ 822, subds. (a)–(b).)

Finally, Brackenbury objects that Susmilch relied on methods for valuation not specifically permitted in Evidence Code sections 815 to 821, code sections specifically governing valuation testimony. Yet the statutory scheme imposes no strict limits. Evidence Code section 814 clearly permits valuation testimony based upon any matter made known to the witnesses, “whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion as to the value of property, including *but not limited to* the matters listed in Sections 815 to 821, inclusive, unless a witness is precluded by law from using such matter as a basis for an opinion.” (§ 814, italics added.) Susmilch offered a reasoned explanation for her reduced valuation—the findings of her colleagues and her own evaluation of the property’s problems, leaving it for the trier of fact to give it the appropriate weight. (See *Bermudez v. Ciolek* (2015) 237 Cal.App.4th 1311, 1340, fn. 11 [questions as to methodology go to weight, not to admissibility]; *In re Marriage of Winternitz*, *supra*, 235 Cal.App.4th at

p. 653 [once expert is found qualified, trier of fact can assess credibility of expert and expert's results].) Susmilch's decision to not employ a traditional "comparables" analysis is not, alone, problematic (*Douglas v. Ostermeier*, *supra*, 1 Cal.App.4th at p. 738), and was understandable given the uniform testimony that the \$375,000 sale price would have been a fair market price for the property had it been trouble free.

***Attorney Fee Award Was Within the Trial Court's Discretion***

The land sale contract in this case provided: "In any action . . . arising out of this Agreement, the prevailing Buyer or Seller shall be entitled to reasonable attorney fees and costs from the non-prevailing Buyer or Seller."

This clause is broad enough to authorize an award of fees and costs to the party prevailing on any claim related to the contract, whether a contract claim or a tort claim. (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 608.)

If a contract's fee clause authorizes an award to a party only if the party prevails on *contract* claims, a court, applying Civil Code section 1717,<sup>1</sup> may well have to decide an award entitlement based solely on the party's success on those contract claims. (*Korech v. Hornwood* (1997) 58 Cal.App.4th 1412, 1419–1423, citing *Hsu v. Abbata* (1995) 9 Cal.4th 863, 876–877; see also *Maynard v. BTI Group, Inc.* (2013) 216 Cal.App.4th 984, 990–992 (*Maynard*); Civ. Code, § 1717, subds. (a), (c).)

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<sup>1</sup> Civil Code section 1717 provides: "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs." (Civ. Code, § 1717, subd. (a).)

It further provides: "In an action which seeks relief in addition to that based on a contract, if the party prevailing on the contract has damages awarded against it on causes of action not on the contract, the amounts awarded to the party prevailing on the contract under this section shall be deducted from any damages awarded in favor of the party who did not prevail on the contract." (Civ. Code, § 1717, subd. (c).)

But where, as here, a fee clause is broader and “encompass[es] noncontractual claims,” a “contract cause of action should not be viewed in isolation from other related claims that were litigated,” it should not be “independently analyzed.” (*Maynard, supra*, 216 Cal.App.4th at pp. 992–993, 995; Civ. Code, § 1717.) Therefore, in a broad fee clause case, “the prevailing party entitled to recover fees normally will be the party whose net recovery is greater, in the sense of most accomplishing its litigation objectives, whether or not that party prevailed on a contract cause of action.” (*Maynard, supra*, 216 Cal.App.4th at pp. 992, 994–995 [plaintiff sole “prevailing party since she obtained a net recovery in the action, albeit under a negligence rather than a breach of contract cause of action”; if she lost the contract “battle,” she won the litigation “war,” obtaining her objectives]; see also Code Civ. Proc., § 1032, subd. (a)(4) [“ ‘Prevailing party’ includes the party with a net monetary recovery . . .”].)

Further, when a “fee provision is broad enough to encompass contract and noncontract claims, in awarding fees to the prevailing party it is unnecessary to apportion fees between those claims. (*Cruz v. Ayromloo* (2007) 155 Cal.App.4th 1270, 1277.)” (*Maynard, supra*, 216 Cal.App.4th at p. 992; cf. *PM Group, Inc. v. Stewart* (2007) 154 Cal.App.4th 55, 68–69 [when fee claims inextricably linked with non-fee claims, apportionment not proper].)

In light of these principles, the trial court’s decision to award fees to the purchasers without apportionment was not error. (*Maynard, supra*, 216 Cal.App.4th at pp. 992–995; see also *Adam v. DeCharon* (1995) 31 Cal.App.4th 708, 711–712 [amidst competing prevailing party claims, tort winner trumped contract loser].) The purchasers, even if they lost their one breach of contract claim, obtained their litigation objective by winning several of their contract-related tort claims and winning a judgment equal to their claimed overpayment for the property. By any reasoned measure, their litigation was a success.

### ***Prejudgment Interest Properly Awarded***

“In an action for the breach of an obligation not arising from contract, and in every case of oppression, fraud, or malice, interest may be given, in the discretion of the jury.” (Civ. Code, § 3288.) If such an action is tried to the court, the court may invoke this statutory provision, and, in its discretion, award interest, including prejudgment interest. (*Bullis v. Security Pac. Nat. Bank* (1978) 21 Cal.3d 801, 815, fn. 16.)

Brackenbury contends the trial court could not award prejudgment interest in this case, because the purchasers’ damages were not “certain” or knowable prior to a judicial determination. (See *Fireman’s Fund Ins. Co. v. Allstate Ins. Co.* (1991) 234 Cal.App.3d 1154, 1173.) First, the purchasers presented sufficient evidence to provide render the damages sufficiently certain. (*Levy-Zentner Co. v. Southern Pac. Transportation Co.* (1977) 74 Cal.App.3d 762, 800 [“the estimates of an expert are appropriate to render the damages certain within the meaning of the statute”].) Second, certainty of damages is only a requirement for an automatic award of prejudgment interest under Civil Code section 3287, subdivision (a), a *different* interest statute. (Civ. Code, § 3287, subd. (a) [“A person who is entitled to recover damages certain, or capable of being made certain by calculation . . . is entitled also to recover interest thereon”].) For a discretionary award of prejudgment interest under Civil Code section 3288, the statute applicable here, there is no certainty requirement. (*Newby v. Vroman* (1992) 11 Cal.App.4th 283, 286–287.)

Brackenbury also argues the award of prejudgment interest was improper because the purchasers did not request it in a formal motion and therefore deprived Brackenbury of a fair opportunity to oppose the award.

We review the procedural history: The trial court issued its statement of decision in May 2013. Shortly thereafter, on June 6, 2013, the purchasers filed a proposed judgment and a letter asserting entitlement to prejudgment interest under Civil Code section 3288. The attached proposed judgment awarded interest at 10 percent. On June 14, 2013, Brackenbury filed a letter objecting to the imposition of prejudgment

interest on the ground an award of interest under Civil Code section 3288 is discretionary, not mandatory. Brackenburg's letter also objected to the amount of prejudgment interest sought, asserting a reduction was required because of a good faith settlement with another defendant and because the purchasers had used the wrong interest rate (7 percent was correct, not 10 percent). Brackenburg also requested leave to file a brief further addressing these issues.

In the wake of the parties' competing attorney fees motions, no judgment was entered. At the hearing on the fees motions, the purchasers told the court "we do still need to deal with the issue of the judgment" and the court said it would address the matter in its ruling. When the trial court resolved the fee motions, on November 8, 2013, it asked the parties to agree on a proposed judgment, or, if they could not, to each submit a proposal "together with points and authorities addressing the disputed issues." Five days later, on November 13, the purchasers resubmitted their proposed judgment along with the parties' competing June letters.

Not hearing from the court, the purchasers filed another letter on March 6, 2014 reminding the trial court of the history and requesting entry of judgment. The purchasers then, on March 18, 2014, filed a separate motion seeking entry of judgment. On or about April 7, 2014, Brackenburg filed an opposition raising the same concerns with the award of prejudgment interest she had raised in her June 2013 letter to the court.

In the meantime, on April 4, 2014—just days before Brackenburg filed her formal opposition—the trial court entered judgment. The judgment awarded prejudgment interest, but incorporated changes Brackenburg had requested. The rate of interest was set at 7 percent and reduced interest would be due starting after the date of the good faith settlement.

Brackenburg, we emphasize, is not arguing the trial court should have waited for her opposition before entering judgment. Rather, she contends the purchasers should have made a formal motion, pursuant to the guidance in *North Oakland Medical Clinic v.*

*Rogers* (1998) 65 Cal.App.4th 824 (*North Oakland*). In that case, plaintiffs, *after* entry of judgment and denial of a new trial motion, submitted a proposed costs order that awarded them prejudgment interest. (*Id.* at p. 827.) This “last minute” surprise request for prejudgment interest violated defendant’s due process right to an opportunity to be heard. (*Id.* at p. 831.) In the court’s view, “prejudgment interest should be awarded . . . on the basis of a specific request . . . made *before* entry of judgment.” (*Id.* at p. 830.) Recognizing no statute or rule governed the process for seeking prejudgment interest, the court stated “requests for prejudgment interest . . . must be made by way of motion prior to entry of judgment, or the request must be made in the form of a motion for new trial no later than the time allowed for filing such a motion.” (*Id.* at p. 831.)

While indicating the best procedural practice, *North Oakland* does not bar a prejudgment interest award here. The purchasers’ “specific request” for prejudgment interest was far from “at virtually the last minute” and was made “*before* entry of judgment.” (*North Oakland, supra*, 65 Cal.App.4th at pp. 830–831.) Even without a formal motion, the purchasers clearly requested prejudgment interest in June 2013, ten months before entry of judgment. That month, both parties presented the trial court with their arguments, in writing, for and against prejudgment interest. The parties were also given an opportunity in November 2013 to further address the matter, at which time the purchasers resubmitted the parties’ competing proposed judgments and letters. Brackenbury could have made a further submission, but did not. Ultimately, the trial court unquestionably reviewed the objections Brackenbury did make. In fact, the court agreed with them, as shown by its modifications to the proposed judgment reducing the interest rate to 7 percent and accounting for the good faith settlement.

Thus, “[t]he present case bears no resemblance to the extreme facts in *North Oakland*” (*Steiny & Co. v. California Electric Supply Co.* (2000) 79 Cal.App.4th 285, 294 [noting *North Oakland* emphasized there is no hard and fast rule for the timing and

procedure for seeking prejudgment interest]), and imposition of prejudgment interest, absent a formal motion, did not violate Brackenbury's due process rights.

**DISPOSITION**

The judgment is affirmed.

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Banke, J.

We concur:

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Humes, P, J.

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Dondero, J.

A142104, *Pec v. Brackenburg*